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IN THE

Supreme Court of the United States

October Term, 1968

No. 365

M. A. HOLAHAN, TRUSTEE, ET AL,
Petitioner,

versus

J. HARRY HENDERSON, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THIS UNITED STATES OF AMERICA:

Petitioner, M. A. Holahan, prays that a writ of certiorari issue herein to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, affirming the dismissal of three of petitioner's claims, which judgment was rendered against him on May 8, 1968; no application for a rehearing was requested.

OPINIONS BELOW

On August 31, 1967, the United States District Court for the Western District of Louisiana rendered three

adverse judgments against the trustee in Bankruptcy. These are the subjects of this appeal.

The opinion of the trial judge is not reported but reprinted at pages 630 through 653 of the official printed record filed herewith. The opinions are reprinted as Appendix "A" hereof.

The opinion of the United States Fifth Circuit Court of Appeals affirming the judgment, dismissing petitioner's claim is reprinted as Appendix "B" hereof.

JURISDICTION

The original jurisdiction of these proceedings were predicated upon the Trustee's authority to institute plenary actions to recover voidable preference under the Bankruptcy Act, Sec. 67 (d) (2) sub-sections, a, b, c, & d, 11 U.S.C.A. Sec. 170, sub-section d (2); Section 70 E, 11 U.S.C.A. 110 (e)(1).

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C.A. Sec. 1254 (1).

QUESTIONS PRESENTED

1. As a matter of law under the Bankruptcy Act, Sec. 67 (d) (2) subsections a, b, c, & d, 11 U.S.C.A. Sec. 170, sub-section d (2); Section 70 E, 11 U.S.C.A. 110 (e) (1), is good

faith a necessary and required ingredient for fair consideration in a transfer of a large sum of money from the president of a one-man dominant controlled corporation to the assistant president within five and one-half (5½) months of filing of a voluntary petition of bankruptcy?

2. As a matter of law, once the plaintiff-trustee has shown possession of Three Hundred Seventy-five Thousand and No/100 ($375,000) Dollars corporate funds in the possession of the officers and directors of a one-man dominant stockholder corporation, have the defendants, officers and directors of said corporation borne the proof required to give a creditable explanation for the loss of the funds by the naked assertion that the funds were lost in a fire which occurred in the woods of Pollock, Louisiana, and a mere denial that they have the money in their possession?

3. As a matter of law, is a repayment by an insolvent corporation of Eighteen Thousand and No/100 ($18,000) Dollars of debentures to the sister of the principal stockholder and director a repayment of risk capital which would constitute a voidable preference under Section 70 E, 11 U.S.C.A. 110 (e) (1) of the Bankruptcy Act, and further a violation of La. Rev. Stat. Title 12 Section 36 and LSA-R.S. 12, Sec. 27.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

LSA-R.S. 12, Sec. 27; Sec. 67 (d) (2) sub-sections a, b, c, & d, 11 U.S.C.A. Sec. 170, sub-section d(2); Bankruptcy Act Section 70E, 11 U.S.C.A. 110 (e) (1); La. Rev. Stat. Title 12 Section 36. The text of these statutes are set forth in Appendix C of this application for writ of certiorari.

STATEMENT OF THE CASE

The Raven Corporation filed a voluntary petition in bankruptcy on October 4, 1964. The investigation of the affairs of the Raven Corporation resulted in the filing of five (5) plenary actions in the United States District Court for the Western District of the United States, principally against J. Harry Henderson as principal stockholder, his wife, Mrs. Constance Henderson, his sister, Miss Rosalie Henderson, and confidant, Perry H. Coleman.

Civil Action Number 11,488 sought the return of One Hundred Three Thousand and No/100 ($103,000) Dollars represented by certified checks issued by the president of the corporation on June 12, 1963, and entrusted to Perry H. Coleman on that date. The proceeds from the checks were then placed in a recently purchased, insured, vacant and unprotected "Jim Walter's home" in Pollock, Louisiana by Perry Coleman where the funds were allowed to remain unprotected in this frame building for a period of ten (10) days until they were allegedly destroyed in a fire which occurred on June

22, 1963. The question to be resolved is the story together with the other activities of these individuals involved in the affairs of the Raven Corporation is so incredible and unworthy of belief that the funds should be returned to the Raven Corporation?

Civil Action Number 11,489 sought the return of Twenty Thousand Nine Hundred Fifty Eight and 90/100 ($20,958.90) Dollars paid by the Raven Corporation to Mr. Henderson's sister, Miss Rosalie Henderson, on April 20, 1963, which the trustee asserts was an actual return of capital in violation of the fiduciary relationship recognized by law existing between officers and directors and stockholders and creditors constitutes a voidable preference under Section 70 E, 11 U.S.C.A. 110 (e) (1) of the Bankruptcy Act, and under La. Rev. Stat. Title 12 Section 36 and LSA-R.S. 12, Sec. 27.

Civil Action Number 11,490 sought the return to the corporation from Messrs. J. Harry Henderson and Perry H. Coleman of Seventeen Thousand Twenty-Eight and 31/100 ($17,028.31) Dollars paid to Perry H. Coleman on April 24, 1964, when the corporation was hopelessly insolvent and within five and one-half (5½) months of its filing its voluntary petition in bankruptcy in that this payment was not for a fair consideration and in good faith and was voidable under Sec. 67 (d) (2) subsections a, b, c, & d, 11 U.S.C.A. Sec. 170, sub-section d(2) of the Bankruptcy Act.

Civil Action Number 11,487 sought the return of a workover rig transferred by the Raven Corporation to Soco, Inc., April, 1964, a new corporation organized to

take over the rig previously owned by the Raven Corporation for which its principal stockholder, J. Harry Henderson, was to receive certain financial benefits if the new venture flourished.

Civil Action No. 12,200 sought the return of Twenty Six Thousand Two Hundred Fifty Three and 64/100 ($26,253.64) Dollars from J. Harry Henderson which represents funds expended by the Raven Corporation to pay the personal indebtedness of the principal stockholder, J. Harry Henderson, which sums were properly ordered returned to the mass of the bankruptcy's estate by the court.

The investigation by the trustee of the affairs of the Raven Corporation revealed these undisputed facts. The corporation was organized as a Louisiana corporation on March 18, 1961, its principal stockholders being J. Harry Henderson, his wife and his sister, with a capitalization of Twelve Thousand and No/100 ($12,000) Dollars and debentures in the amount of Eighteen Thousand and No/100 ($18,000) Dollars; the history of the Raven Corporation until March 18, 1963, was rather uneventful except that it was continuously losing money and was in the red in an approximate sum in excess of Two Hundred Thousand and No/100 ($200,000) Dollars. That on March 18, 1963, an oil and gas workover rig was reinsured for the sum of Three Hundred Seventy-five Thousand and No/100 ($375,000) Dollars. That on March 20, 1963, the ill-fated rig "Belle Rose Lee" recently insured was lost in a fire. That as a result of this calamity the Raven Corporation was paid on April 13, 1963, the sum of Three Hundred Seventy-five

Thousand and No/100 ($375,000) Dollars, which was deposited in a special account of the Raven Corporation controlled by its principal stockholder, J. Harry Henderson; that immediately J. Harry Henderson paid obligations totaling Two Hundred Three Thousand Nine Hundred Forty-two and 27/100 ($203,942.27) Dollars, all of which represented debts of the corporation personally guaranteed by himself as well as alleged funds advanced by himself to the corporation and included the sum of Eighteen Thousand and No/100 ($18,000) Dollars of risk capital returned to his sister, Miss Rosalie Henderson; that on May 25, 1963, an alleged Board of Directors meeting was held of the Raven Corporation, the first in some two years, whereby Perry H. Coleman, an employee of J. Harry Henderson, was employed by the Raven Corporation as assistant to the President retroactive to March 20, 1963, the date of the fire of the Belle Rose Lee, for an alleged salary of One Thousand and No/100 ($1,000) Dollars per month, plus expenses. That on June 12, 1963, J. Harry Henderson entrusted One Hundred Thousand and No/100 ($100,000) Dollars in certified checks and a Three Thousand ($3,000) Dollar uncertified check to Perry H. Coleman for the alleged purpose of purchasing leases for the Raven Corporation in Grant Parish, Louisiana. These checks were all cashed by Perry H. Coleman at the Hibernia National Bank on June 12, 1963, at different windows of said bank. The funds then were brought to Pollock, Louisiana, where they were placed by Perry H. Coleman in a recently purchased or constructed Jim Walter's home outside of Pollock, Louisiana, where this sum of cash was allowed to remain in this frame building unprotected in the woods of Pollock, Louisiana, until

the night of June 22, 1963, when the edifice and the cash were all totally destroyed by fire. That it is coincidental that on June 8, 1963, Perry H. Coleman commenced to purchase 39 leases for the benefit of J. Harry Henderson in Vermillion Parish, Louisiana; that not until some five (5) or six (6) days after the fire was J. Harry Henderson informed of the loss of the One Hundred Three Thousand and No/100 ($103,000) Dollars and he then advised Perry H. Coleman to see him "about it in the morning"; they jointly made an effort or inquiry about recovering the funds of the fire loss, but were advised by the Treasury Department to whom the charred remains of the oaken box was given to determine if any cash destroyed could be salvaged, that the debris contained no contents showing evidence of U. S. currency except some coins, nails and other debris. That despite rather nominal income Perry H. Coleman allows his salary and expenses of the Raven Corporation to accrue until April of 1964, when the corporation already the subject of numerous suits, and admittedly insolvent, received a Twenty-eight Thousand and No/100 ($28,000) Dollars account receivable from Texaco, Inc. These funds were deposited in the Raven's account and Perry H. Coleman was paid the sum of Seventeen Thousand Twenty-eight and 31/100 ($17,028.31) Dollars which he deposited in a special account in his name and used the proceeds allegedly to be his past due wages to purchase further leases for J. Harry Henderson in Vermillion Parish, Louisiana. That in September of 1964, J. Harry Henderson, his sister and wife resigned as officers and directors of the Raven Corporation, transferred the stock of the corporation to Perry H. Coleman for the sum of Twelve

and No/100 ($12) Dollars, and five days later Perry H. Coleman, as the President of the Corporation, filed a voluntary petition in bankruptcy with the United States District Court for the Eastern District of Louisiana.

The trial judge, in a very colorful opinion, compared the business ventures of the Raven Corporation to that of a ship at sea. His opinion was wrought with humor, when speaking of the loss of funds by the Raven Corporation he said that the bilges were leaking and they continued to leak until such time as the Raven Corporation had scuddled itself on the saddest seas of commerce by filing a voluntary petition in bankruptcy on October 4, 1964. In describing the first fire loss of Three Hundred Seventy-five Thousand and No/100 ($375,000) Dollars he referred to it as follows: "What acumen and effort had been unable to provide, disaster had provided —a profit."

From the three adverse judgments rendered August 31, 1967, the trustee had appealed to the Fifth Circuit Court of Appeal and the case was argued on April 29, 1968, and a memorandum opinion rendered on May 8, 1968, some nine days thereafter, affirming the trial court in a five line opinion stating that the trial judge had in very colorful and nautical terms decided the issues of this case and that they passed muster.

Hence, petitioner has filed this application for a certiorari pursuant to provisions of 28 U.S.C.A., Sec. 1254 (1). The trustee in making his investigation of the affairs of the Raven Corporation concluded that

the entire scheme commenced on March 18, 1963, through its termination of the filing of a voluntary petition in bankruptcy on October 4, 1964, constituted a plan and fraudulent scheme of bankruptcy to the detriment of the ordinary creditors of the Raven Corporation. He also found that the activities of the corporation were controlled exclusively by J. Harry Henderson, its president, and Perry H. Coleman, his trusted employee for years and assistant to the president of the corporation until such time as he was elected president on September 28, 1964, five days before the filing of the petition in bankruptcy.

The trustee filed proceedings No. 11,488, seeking the return of the One Hundred Three Thousand and No/100 ($103,000) Dollars allegedly lost in a fire on June 22, 1963, based upon the rule of law and enunciated by this court that once the trustee shows possession of the funds in the hands of the bankrupt, particularly officers and directors thereof, it is incumbent upon them to give a credible explanation for the disappearance of the funds. The defense to this action was that J. Harry Henderson was a respected businessman and a millionaire, and he believed that Perry H. Coleman had lost the money as described.

The District Court found the story weird but uncontradicted and further supported by the muse that Henderson continued to retain Perry H. Coleman as his agent, but then held that the trustee had failed to disprove their story, and failed to apply the rule of law that is incumbent upon the defendants to give a reasonable and credible explanation for the loss of the

funds. May v. Henderson, et al, 268 U.S. 111, 45 S. Ct. 456; Maggio vs. Zietz, 333 U. S. 56, 68 S. Ct. 401, 92 L. Ed. 502.

In Civil Action 11,489, the trustee sought the return of the funds paid to the sister of Mr. J. Harry Henderson in the amount of Twenty Thousand Nine Hundred Fifty Eight and 90/100 ($20,958.90) Dollars as this was a voidable preference under Section 70 E, 11 U.S.C.A. 110(e) (1) of the Bankruptcy Act. The defense to this action was that it was an ordinary, innocent, corporate transaction; however, considering the other various activities of these individuals and the admonishment of this court in Pepper v. Litton, 308 U. S. 245, 60 S. Ct. 238, wherein in referring to the activities of the one-man dominant stockholder corporation it held as follows:

> "He cannot utilize his inside information in his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly to the corporation which he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements."

Civil Action No. 11,490 sought the return of Seventeen Thousand Twenty-eight and 31/100 ($17,028.31) Dollars which represent alleged accrued salary and expenses to Perry H. Coleman from March 20, 1963, through April, 1964. During this tenure of employ-

ment, Mr. Coleman was also employed by J. Harry Henderson and paid compensation and reimbursed expenses. However, pretermitting the question of the usefulness of the services by Mr. Coleman to the Raven Corporation, the payment in April of 1964, when the corporation only had Two Hundred and No/100 ($200) Dollars in the bank, prior to its receiving the Twenty-eight Thousand and No/100 ($28,000) Dollars from the Texaco Corporation, and this sum being deposited in a special account of Perry H. Coleman and used for the benefit of J. Harry Henderson, does not meet the requirements of Sec. 67 (d) (2) sub-sections a, b, c, & d, 11 U.S.C.A. Sec. 170, sub-section d (2) of the Bankruptcy Act, which provides that every transfer made within one year prior to the filing of a petition in bankruptcy is voidable as to creditors if the obligation is not made or incurred for a fair consideration. A necessary ingredient of a fair consideration is "good faith."

As to the requirements of fair consideration of which good faith is an ingredient, Sec. 67 (d) (2) sub-sections a, b, c, & d, 11 U.S.C.A. Sec. 170, sub-section d(2), it is incumbent upon the defendants to show the good faith of the transaction both under the Bankruptcy Act and Louisiana law, and more particularly the pronouncements found in Pepper v. Litton.

REASONS FOR GRANTING THE WRIT

The Federal questions decided herein have been decided below in a way which is not in accord with the applicable decisions of this court. It is of vital im-

portance to the business community of this country, and particularly those that sell their products on open accounts and credit, that only those deserving individuals or businesses entitled to the relief of a bankruptcy act should prevail and that the act should not be an avenue of escape to the detriment of its creditors by various schemes of the insiders, particularly in instances of one-man dominant corporations. Actually, much more is involved. The court should let the business community know once more that the moral principles enunciated by this court, Pepper v. Litton, 308 U.S. 245, 60 S. Ct. 238 (1939), and cited in numerous lower decisions over the years, is still the law of the land that the activities of dominant stockholders in small controlled corporations, particularly in bankruptcy proceedings should be rigorously scrutinized for any improprieties, moral or legal.

It will be a question of first impression if this Court should grant a writ on the question of the transfer of the salary from the corporation to Perry H. Coleman within five and one-half (5½) months of going bankrupt as to whether good faith is a necessary ingredient of fair consideration.

The Fifth Circuit indicated this was true in the case of Mayo v. Pioneer Bank & Trust Co., 297 Fed. 2d 392 (5th Cir. 1961), and the authors of Collier's on Bankruptcy, Vol. 4, p. 424, indicated emphatically that good faith is a necessary requirement for fair consideration under Section 67 (d) (2) sub-sections a, b, c, & d, 11 U.S.C.A. Sec. 170, sub-section d(2) of the Bankruptcy

Act. Otherwise, the transfer within the year is voidable by the trustee.

Plaintiff concedes that because J. Harry Henderson is a millionaire in a small community and it is no crime in this country nor should he be found guilty of alleged unlawful acts unless the trustee has borne the burden of proof as required by the law in decisions of this Court; however, at the same time the fact that he is a millionaire should not be the sole basis of his defense to activities of the Raven Corporation that bear scrutiny, particularly when the facts which are the basis of the inquiry are undisputed between the parties.

Finally, this Court in a recent case of Protective Committee for Independent Stockholders of TMT, Trailer, Ferry, Inc. v. G. Gordon Henderson, 88 S. Ct. 1157, 1968 court, held as follows:

> "It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law. Here there is no explanation of how the strengths and weaknesses of the debtor's causes of action were evaluated or upon what grounds it was concluded that a settlement which allowed the creditor's claims in major part was "fair and equitable."

As in this instance the Court of Appeal dealt with the District Court's opinion in five sentences and as in the TMT case failed to give consideration to all relevant factors and comprehensive consideration as required by this Court.

CONCLUSION

For the reasons stated above the decision of the Court of Appeals in the instant case has failed to pass on questions of general importance in the administration of the Bankruptcy Act which should be reviewed by this Court and public interest requires that the authoritative pronouncements of Pepper v. Litton, 308 U. S. 245, 60 S. Ct. 238 (1939); Maggio v. Zietz, 333 U. S. 56, 68 S. Ct. 401, 92 L. Ed. 502; May v. Henderson, et al, 268 U. S. 111, 45 S. Ct. 456 (1925), should be reaffirmed as authoritative determination as to correctness of trustee's position.

The present petition of a writ of certiorari should, therefore, be granted.

Respectfully submitted,

GEORGE C. CONNOLLY, JR.

STATE OF LOUISIANA
PARISH OF ORLEANS

GEORGE C. CONNOLLY, JR., being duly sworn, deposes and says:

That he is a duly qualified member of the Bar of the Supreme Court of the United States; that he has forwarded copies of the petition for certiorari to Mr. J. Harry Henderson, Mrs. Constance Henderson, Miss Rosalie Henderson and Perry H. Coleman by depositing a copy thereof, postage prepaid, to their counsel of record at their last known address in Alexandria, Louisiana, on this _____ day of July, 1968.

_____
GEORGE C. CONNOLLY, JR.

SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY, THIS
_____ DAY OF JULY, 1968.

_____
NOTARY PUBLIC

APPENDIX A

Here are set forth successively the opinions and judgment rendered in the United States District Court for the Western District of Louisiana on August 31, 1967.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CIVIL ACTIONS NOS. 11,488, 11,489, 11,490 and 12,200

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(For Perry H. Coleman)

HUNTER, JUDGE:

Plaintiff in each case is the trustee of a corporation in bankruptcy. The cases concern requests by the trustee that certain funds expended by Raven Corporation before its bankruptcy be placed back in his hands for the benefit of the corporation's creditors.

Defendants in the cases are J. Harry Henderson, the controlling stockholder and former president of Raven; Perry Huey Coleman, a former employee of Raven; and Rosalie Henderson, J. Harry Henderson's sister and a stockholder.

The Raven Corporation's voyage on the ocean of enterprise was, almost from the beginning, ill-starred. It was organized on March 18, 1961, as a Louisiana corporation, and was provisioned with the usual plenary powers allotted to maiden corporations by their promoters. The primary purpose of the corporation, however, seems to have been to conduct the business of renting and operating work-over rigs in oil fields in and around southern Louisiana. For this purpose, the omens looked good. The work-over business was strong and most of its participants prospering. It had 12,000 shares of paid-in, one-dollar par stock, and before the end of April, 1961 had received $18,000 for eighteen debenture bonds in the sum of $1,000 each. It had also the participation and services as vice-president of stockholder John O'Connor of New Orleans, a man familiar with the ins and outs of the work-over business. So with good expectations the corporation established its office in New Orleans, entered into lease-

purchase agreements for a couple of drilling rigs, and commenced operations.

As sometimes is the case, however, the wind and weather over the horizon were not as they had appeared from the port. For a time business gross was good but expenses were high. There was some dispute among the stockholders and operators as to the propriety of some claims against the corporation. The rigs did not stay as busy as had originally been anticipated. The corporation began to lose money.

The one bright aspect in an otherwise dark situation was provided on March 20, 1963, when one of the company's rigs was destroyed by fire. Although the rig was only worth some $100,000 on the company's books, it had, at the insistence of the insurance companies, been insured at $375,000, its replacement value. What acumen and effort had been unable to provide, disaster had provided — a profit.

But the corporate bilges still leaked. Tacks into various other enterprises relating to the oil business— well producing, the buying and turning over of leases — could not bail them out. Quoth the Raven Corporation, "nevermore," and it filed voluntary bankruptcy in the United States District Court for the Eastern District of Louisiana, scuttling itself sadly on the hardest shoal in the seas of commerce, on October 7, 1964.

The duly appointed trustee in bankruptcy, Mr. Holohan, quite properly concerned himself with poking

through the wreckage. In the company's records and history he found several transactions with which he was dissatisfied. For the benefit of the corporation and its creditors he filed the following actions, which were tried before this Court.

Civil Action No. 11,488 involved perhaps the most startling aspect of the company's history. In June of 1963 Mr. Henderson, as president of the corporation, wrote to Mr. Coleman $103,000 in checks from the Raven Corporation. The purpose of the checks was to provide Coleman with funds to buy oil and gas leases for the company in Grant Parish. Mr. Coleman cashed the checks and set upon this enterprise. However, he reported that some ten days later he left the cash in a small home in Colfax, which building he had planned to use as his office during the purchase of the leases. That building burned to the ground, destroying literally all remnants of the cash left in it. Plaintiffs argue that this story is not worthy of belief, that the money should be returned to the corporation, and at least by implication that Mr. Henderson, Mr. Coleman, or both, converted it to ends of their own.

Civil Action No. 11,489 concerns the payment by Raven to Rosalie Henderson, on April 20, 1963, of $20,958.90 for the face value of and interest on company debentures held by her. Plaintiffs argue that Mr. Henderson and his sister should place this sum back in the hands of the corporation.

Civil Action No. 11,490 seeks the return to the corporation by Messrs. Henderson and Coleman of $17,028.31

paid to Coleman on April 24, 1964. This payment, on record, was for salary and expenses for thirteen months work for Raven, from March 20, 1963 to April 20, 1964.

Civil Action No. 12,200 involves the payment on June 3, 1963 of $26,253.64 to the Texas-Pacific Coal and Oil Company under an invoice received by Raven for its share of expenses in working interest on a dry well. This working interest was acquired by Raven from its president, Mr. Henderson. At the time of the invoice and its payment, the well had been plugged as dry for almost a month. Plaintiffs consequently maintain that this payment constituted the assumption of an obligation which Mr. Henderson himself would otherwise have had to pay, and that the corporation received no consideration for such an assumption, inasmuch as the well was dry and worthless.

We consider the cases separately:

CIVIL ACTION NO. 11,488

HOLAHAN, TRUSTEE, AND THE RAVEN CORPORATION

VS.

J. HARRY HENDERSON, JR., AND PERRY HUEY COLEMAN

On June 12, 1963, Henderson, as president of the corporation, wrote Coleman $103,000.00 in checks on

the corporation's account. As reflected in the record of a May 25, 1963 directors' meeting, Coleman was to proceed to Grant Parish, Louisiana to buy oil and gas leases there. The leases were then to be sold again, or "turned over," to potential producers at a profit to the corporation. Coleman cashed all the checks the same day at the Hibernia Bank in New Orleans. He proceeded to Grant Parish and set up his office for the lease play in a small home adjacent to the home of an aunt, since deceased. He placed the cash in an oaken cash box and placed the box on the upper shelf of a cabinet. During the evening of June 22, 1963 the building burned to the ground and the cash was destroyed completely. Or such was the story as reported by Coleman.

Plaintiffs insist that the story is not to be believed; that it is just too incredible. Counsel for plaintiffs cite a long list of cases involving bankruptcies and suspicious disappearances of property or money. Most of these cases are on point, if at all, only in a general sense. They were not, for the most part, centered around the issue of whether a particular accounting for a bankrupt's funds was to be believed or not. They stand for no principles by which such accountings are to be believed or not to be believed. Perhaps the best summary of the situation was the Eighth Circuit's in *Seigel v. Cartel*, 164 F. 691 ,at p. 692: "The credibility and reasonableness of his [the defendant's] story were addressed to the judicial discretion of the District Judge."

This discretion is not to be lightly exercised. Nothing could be more unsettling than the thought of the de-

fendants rifling through a stack of cash in the amount of $103,000 after judgment has been rendered in their favor—nothing, that is, unless it be the thought of the defendants saddled with a judgment for such a large sum which they did not in fact convert, and do not in fact have in their possession. Equally perturbing is the reflection that the question is almost entirely one of credibility. There is little evidence to discredit defendants story, or to substantiate it. There are only the details of the story itself.

The only contradictory evidence offered by plaintiffs concerned the purchase of leases by Henderson and Coleman for W. T. Burton of Lake Charles, shortly after the fire. Also introduced by plaintiffs were various bank account statements of Henderson and Coleman. The suggestion was that the $103,000 was converted to buy these leases and secure a profit on their turnover to Burton. But there are no cash flows reflected between Coleman and Henderson, or vice versa, or between either of them and the lessors involved, which are at all commensurate with the sum said to have burned. The evidence as to the Burton deal shows no more than that Henderson and Coleman had oil and gas activities outside their interests in the Raven Corporation — a fact which no one denies.

Although the story is on its surface an unlikely one, defendants have adequately answered and explained questions relating to its more bizarre aspects. Why was such a sum given to Mr. Coleman? To engage in a lease play then very active around Grant Parish. Expert testimony, taken by deposition, establishes that this particular area was "hot" at the time. Why was

cash to be used, instead of checks, in purchasing the leases? Because small landowners prefer it, and most of the leases were to be bought from small landowners. Why were all the checks cashed at once, instead of as needed? Henderson intended them to be cashed as needed, and had written the checks all at once because he was leaving Louisiana to attend golf tournaments with his wife. But Mr. Coleman decided in his absence that cashing all the checks at once would save time that otherwise would be spent in commuting to Alexandria to obtain cash as needed, and that frequent trips to Alexandria banks might put people onto the fact that the lease play was being conducted. This would make bargaining harder, and might invite competition. Why were not the local Grant Parish authorities informed after the fire of the presence of the cash in the house? Because defendants feared a smaller, more localized, but equally energetic version of the mid-Nineteenth Century gold rush if such a rumor were to get out. In other words, the outstanding oddities of the tale are met with consistent explanations, which explanations are met in turn merely with plaintiffs' repeated assertion that the tale is too incredible on its fact to be believed. This naked assertion is not enough to tip the scales against defendants.

Surely, Henderson, a successful and respected business man, had no reason to participate in a scheme of fraud against his company. In June of 1963 the Raven Corporation was solvent, due to receipt of insurance proceeds on the rig fire of March, 1963. The March 31, 1963 balance sheet showed a total deficit of $133,413.57, before receipt of the insurance proceeds. Receipt of the

$375,000 insurance, therefore, pushed the corporation back into comfortable solvency. Since Mr. Henderson, his wife, and his sister together owned 9,000—or 75 per cent— of Raven's 12,000 shares of common stock, it is unlikely that Henderson would seek to defraud his own solvent company as suggested. He would have nothing to gain, and would stand to lose not only the legal and social penalties attached to criminal acts, but also the presumably substantial fees for Coleman's hypothetical nefarious services. Mr. Henderson did not pass the matter off as being of no importance, as plaintiffs imply. As we recollect the evidence, he was on the verge of apoplexy when he received news of the fire. The atmosphere in his office was anything but relaxed for some time thereafter.

The Raven Corporation had a right to buy oil, gas and mineral leases. The Board of Directors authorized the company's president to acquire oil, gas and mineral leases and to spend $100,000 of its funds buying oil, gas and mineral leases. Henderson was acting within this authority when he issued checks to Coleman to acquire leases. He expected Coleman, a company employee, to carry out his instructions and the orders of the Board of Directors, i.e., to use the money to buy leases. After delivering the checks to Coleman, Henderson never saw them again, did not have them in his possession, nor did he ever see the proceeds. Henderson had no part in the fire at the Coleman house, nor was he responsible for it. Henderson never had possession of the money, nor did he have possession of the checks after giving them to Coleman. No one has connected Henderson with the money, nor placed it in his possession

at any time, before or after the fire. These observations, and the further observation that Henderson's personal gross income for 1963 was over $100,000 and his net worth over $1,000,000 render preposterous any suspicion that Henderson was involved in arson.

It is conceivable that Mr. Coleman, without Mr. Henderson's knowledge, could have perpetrated fraud both upon Raven Corporation and Henderson. The Court takes note that in the case of *Perry H. Coleman, Jr. v. Manufacturers Casualty Company,* 85 So. 2d 47 (1956), the Supreme Court of Louisiana did not accept testimony of this same defendant as to a theft loss on a liquor store owned by him. There, he had the burden of proof. The case involved an insurance claim by Coleman for the loss, and both the district and supreme courts denied the claim. This circumstance makes it difficult to reach a decision as to Coleman's liability. But there is no proof here that Coleman's story is not true. It is consistent and not contradicted, if weird, and is further supported by the muse that Henderson continues to retain him as an agent.

After the fire, defendants contacted Mr. Frank N. Proctor of the Currency Redemption Division of the Treasury Department in Washington. They sent at his request a limited quantity of ash to Washington where it was unsuccessfully examined for reclaimable currency. Mr. Proctor's testimony at trial was that the process for redeeming burned currency is purely mechanical and involves no chemical test to show whether currency ashes are or are not present, and that no currency was found in the ashes furnished

to him. It is not likely that defendants, had they committed fraud, would have then sought the government's aid to investigate the fire for remnants of the currency. As it happened, other debris from the fire showed signs of such complete combustion as to lead Mr. Proctor to conclude that paper currency would not be expected to survive a fire of such intensity.

CONCLUSION

This Court has jurisdiction of this cause by virtue of Title 11, Section 46 U.S.C.A. The sections of the Bankruptcy Act which could be applicable here is Section 70(e), which is 11 U.S.C.A. 110(e)(1). Here, this presents purely a factual question. Did Mr. Henderson and/or Mr. Coleman steal $103,000 of the Raven Corporation's money? Our thoughts and findings on this query have heretofore been set out.

In case No. 11,488 there should be judgment for defendants. There is.

CIVIL ACTION NO. 11,489

HOLAHAN, TRUSTEE, AND THE RAVEN CORPORATION

VS.

J. HARRY HENDERSON, JR. AND ROSALIE HENDERSON

Raven issued $18,000 of debentures, all of which were

owned at the time they were paid by Miss Rosalie Henderson. She had acquired these debentures before maturity and for value, paying the company itself $12,000 for the first twelve and buying the other six from her brother. He, in turn, had paid the corporation $6,000 for those issued to him. On April 20, 1963, the corporation paid these debentures and the interest that had accrued on them. The total paid, including interest, amounted to $20,958.

Here, the trustee seeks to recover this amount from Miss Henderson and her brother, J. Harry Henderson, under Section 70(e) of the Bankruptcy Act. The Trustee's position is that 70(e) arms the trustee with authority to set aside any preference or transaction voidable under state law, and that under LSA-R.S. 12:27 directors are liable who knowingly and without exercising due diligence vote favorably for an unlawful return of assets to a shareholder. In essence, this contention is that Henderson, a director and principal stockholder of the corporation, returned a capital contribution to his sister in violation of LSA-R.S. 12:27. Mr. Warren Garfunkel, an attorney and certified public accountant, testified that in his opinion, although the indebtedness was called debentures, it was in truth and in fact a capital contribution.

We agree with plaintiffs that in determining the nature of these debentures, we should look at the substance of the matter and not the nomenclature used. Whatever one might wish to call these instruments, they were still debts, direct obligations of the Raven Corporation, and not in our judgment a part of its

capital structure. These debentures reveal on their face that they are direct promises on the part of Raven to pay the holder a fixed amount on a certain date. Stock indicates a part ownership of a business, a pro rata share in the ownership of the assets. If the business prospers, the stock becomes more valuable. Had Raven prospered to the extent of making millions, Miss Henderson's debentures were worth $18,000 and interest, and no more.

Were the Court convinced that the indebtedness was in fact capital stock, this case should still be decided for the defendant. A solvent corporation can run a stock redemption if it chooses; solvent corporations, no doubt, do so daily. On April 20, 1963, Raven was solvent. There is nothing wrong with a solvent corporation paying its matured obligations, even though the creditor is a stockholder, a director and an officer. The fact that the corporation later becomes insolvent, and 18 months later goes into bankruptcy, does not make the payment illegal, fraudulent, nor voidable, under the Louisiana law.

The plaintiffs' demands should be rejected. They are.

CIVIL ACTION NO. 11,490

HOLAHAN, TRUSTEE, AND THE RAVEN CORPORATION

VS.

J. HARRY HENDERSON AND PERRY HUEY COLEMAN

On April 28, 1964, the Raven Corporation paid to Perry H. Coleman salary and expenses for a period from March 20, 1963 through April, 1964. The amount paid was $17,028.31 (salary of $13,000 and expenses of $4,028.31). On October 7, 1964 Raven filed a voluntary petition in bankruptcy. The Trustee contends that under Section 67(d)(2) of the Bankruptcy Act, 11 U.S.C.A. 107(d)(2), these payments are voidable.[1]

The evidence reveals that Mr. Coleman went to work for Raven as assistant to the president on or about March 20, 1963. Subsequently, on May 25, 1963, Mr. Henderson's action in hiring Coleman was ratified by the Board of Directors, and the latter's duties and salary were set forth. Coleman was to receive $1,000 per month salary, and was to be reimbursed his expenses while traveling. Mr. Coleman was a long time associate of Mr. Henderson and his duties for the corporation were well worth the amount of the salary he was paid. The business (operating work of rigs in the Gulf of Mexico) operated around the clock, and many demands were made upon Coleman in connection therewith at all hours of the day and night. It is true that Mr. Coleman did not totally abandon all

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[1] 11 U.S.C.A. § 107, sub. d(2)(b) provides: "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent * * * (b) as to then existing credits and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent."

other activities during the 13-month period in question (March 20, 1963 to April 20, 1964), but Coleman did devote the major portion of his time and efforts to his job with Raven. Other employees of the company drew full salary to the very end of the company's business.

We find no evidence to support the allegations of the petition to the effect that the payment of the salary of $13,000, and expenses in the amount of $4,018.31, constituted a fraudulent scheme to divert funds of the corporation to the prejudice of existing and future creditors.

Counsel for plaintiffs state the issue succinctly: "It therefore narrows itself to the legal proposition of whether the funds were paid to Perry H. Coleman for a fair consideration and in good faith." As for "fair consideration," there can be no question but that on the record Mr. Coleman earned and was due what he was paid. The major thrust of plaintiffs' argument is directed to their argument that fair consideration is to be distinguished from good faith. This is hardly possible under the definition of fair consideration contained in 11 U.S.C.A. 107(d)(1)(e). As that statutory definition is applied to the instant case, consideration for the payment was "fair" if it was received in good faith for an antecedent debt.[2]

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[2]Section 67, sub. d(1)(e) provides that consideration is " 'fair' * * * when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied." Section 67, sub. d(1) defines broadly as "any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent."

All the evidence clearly indicates that there was no scheme to defraud anyone; Coleman had devoted ten months of hard work and was due his salary just as any other employee of the corporation. He asked for it in early 1963 and was asked by Mr. Henderson to wait until a large payment expected from Texaco came in. Coleman agreed to do this. When the payment came in he was paid and so were others. There is nothing to prove that this was done in anticipation of bankruptcy which was filed some 5½ months later. Plaintiffs urge insolvency of the company at the time of payment as being indicative of the lack of "good faith." Were technical insolvency enough to void payment of wages, the corporate officer who made or authorized the payment of wages or other current obligations would be so hamstrung that he could not possibly keep the business going and the employees on the job for fear of having to personally reimburse a trustee in bankruptcy for every payment made during periods of technical insolvency. Such a result would make a mess of the orderliness and finality the bankruptcy statutes seek to provide for the commercial world.

Summarizing our conclusion as to this claim the Court finds that the requisites of a voidable preference under Section 67, sub. d(2), 11 U.S.C.A. § 170 sub. d(2), are not present. There was a fair consideration. The transfer was not part of a scheme to hinder, delay or defraud creditors.

Plaintiffs' demands should be rejected. They are.

CIVIL ACTION NO. 12,200

M. A. HOLAHAN, TRUSTEE IN BANKRUPTCY OF THE RAVEN CORPORATION; AND THE RAVEN CORPORATION

VS.

J. HARRY HENDERSON

This action under 70(e)(1), 11 U.S.C.A. 110(e)(1), is for $27,253.64. The sum of $26,253.64 was paid by Raven Corporation to Texas-Pacific Coal and Oil Company for drilling expenses incurred and assessed for the drilling of the No. 1 Clement Gros Well. Pertinent facts, in chronological order, are:

1. *June 15, 1962* - Paladin Corporation conveyed unto Henderson an overriding royalty interest in certain lands, together with a privilege to convert that overriding royalty interest into a larger working interest.

2. *January 15, 1963* - Henderson agreed to pay his proportionate share for the drilling of Clement Gros Well No. 1.

3. *February 25, 1963* - A copy of an operating agreement bearing this date was prepared for the execution of the drillers of the well. A copy was forwarded to Henderson. Under the terms of the agreement the cost of the well was to be

borne by the various parties and Henderson was to bear his proportionate part.

4. *March 6, 1963* - Texas-Pacific spudded the test well (Clement Gros No. 1).

5. *May 5, 1963* - Clement Gros Well No. 1 was plugged and abandoned.

6. *June 3, 1963* - Henderson signed the operating agreement on behalf of Raven Corporation. He also forwarded to Texas-Pacific Coal and Oil Company a certified copy of his assignment of his interest to the Raven Corporation.[3] This assignment had been dated April 1, 1963 and was not recorded until May 29, 1963. It is noted that the original operating agreement which had been sent to Henderson was in Henderson's name, but that it was changed to reflect the ownership of the Raven Corporation rather than Henderson, and the acknowledgment was also changed to a corporation acknowledgment. On this date, too, the Raven Corporation forwarded to Texas-Pacific its check in the sum of $26,253.64. This was the amount which Henderson would have owed had the interest been his rather than Raven's.

7. *October 7, 1964* - The corporation filed in bankruptcy.

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[3]This is the same agreement which had been dated and forwarded to Henderson on February 25, 1963.

On May 5, 1963 the obligation to pay the $26,253.64 was the obligation of Mr. Henderson, who was the owner of the leasehold interest in the well. Mr. Henderson had accepted the obligation on January 15, 1963. If the payment in question had been made several months earlier it would be voided as being in contravention of 11 U.S.C.A. 107(d)(2) because of a complete failure of consideration. That section is not applicable, because the transfer was not within one year of the bankruptcy petition. However, the payment of this obligation must be set aside under 11 U.S.C.A. 110(e).[4] We think plaintiff is entitled to prevail under the simple equity remedies available under Articles 21 and 3183 of the Louisiana Civil Code[5] (*Shreveport Sash and Door Company v. Ray*, 159 So. 2nd 434 (La., 1964). The "doctrine of alter ego" simply passes liability on to the owner of the corporation who in this instance treated its affairs as his own. Raven had no obligation to pay this debt and when Henderson paid it in behalf of Raven, he thereby became liable to the creditors, and through them to the trustee.

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[4] *11 U.S.C.A. § 110(e)(1):* "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor."

[5] *Article 21:* "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." *Article 3183:* "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference."

The bankruptcy courts have equity powers in passing on a wide range of problems arising in the administration of bankruptcy estates. They have been invoked to the end that substance will not give way to form, that technical considerations will not prevent substantial justice from being done. Hence, this Court has full power to inquire into the validity of any payments that have been made. Where any contract with a corporation is challenged, the burden is on the sole owner of the corporation to show that the transaction was inherently valid from the viewpoint of both the corporation and those interested therein. The essence of the test is whether or not, under all the circumstances, the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. Normally, the right to set aside a transfer such as this would be enforceable through a stockholders derivative action, but in the event of bankruptcy of the corporation, such claims are enforceable by the trustee. *Pepper v. Litton,* 308 U.S. 295).

Summarizing, the creditors of Raven, acting through the Trustee, have the right to bring an action against the dominant stockholders to void the payment by the corporation of an obligation that it did not legally owe. The fact that the debt was not legally owed is a sufficient basis for the exercise by this court of its equitable powers of holding the dominant stockholder responsible to the creditors for this amount. Otherwise, the fiduciary duties of dominant or management stockholders would go for naught, and equity would be perverted as an instrument for approving what it was designed to thwart. The fact that more than one year elapsed be-

tween the date of the payment and the bankruptcy petition is no obstacle to equitable relief.

The circumstances of this case are unusual, and the Court, viewing the matter in its entirety, considers that this, in fact and law, is a situation in which the Court is called upon to exercise traditional equity powers of a court in bankruptcy. Here, the debt was owed by Henderson at the time that it was incurred. The assignment to Raven was never accepted by Raven, and the entire transaction must be set aside.

Accordingly, there should be judgment in favor of petitioner and against the defendant in the amount of $27,253.64.[6] This decision is rendered in its entirety on this the 31st day of August, 1967, at Lake Charles, Louisiana.

(Signed) EDWIN F. HUNTER, JR.
UNITED STATES
DISTRICT JUDGE

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[6]The debt owed by Henderson which was paid by the corporation to Texas-Pacific was $26,253.64. The additional amount of the judgment represents the $1,000 paid by Raven to Henderson. This transaction has now been set aside by virtue of this judgment, and the trustee should re-convey title to Henderson.

APPENDIX B

Here is set forth succinctly the memorandum opinion rendered by the United States Fifth Circuit Court of Appeal on May 8, 1968.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25514

M. A. HOLAHAN, Trustee, ET AL.,
Appellants,

versus

J. HARRY HENDERSON, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

(May 8, 1968.)

Before BROWN, Chief Judge, DYER, Circuit Judge, and GARZA, District Judge.

PER CURIAM: The issues and subsidiary facts in this case are set out in sufficient and sometimes colorful and nautical detail in the opinion of the District Judge. ____ F.Supp. ____ The matters at issue are essentially questions of fact and the findings made readily pass muster under F.R.Civ.P. 52(a).

AFFIRMED.

APPENDIX C

Here are set forth successively the text of:

Bankruptcy Act, Sec. 67 (d) (2) sub-sections a, b, c, & d, 11 U.S.C.A. Sec. 170, sub-section d (2).

Every transfer made and every obligation incurred by debtor within one year prior to the filing of a petition initiating a proceeding under this act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to the then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or about to engage in such business or transaction for which the property remaining in his hands is an unreasonably small capital without regard to his actual intent; or (c) as to then existing and future creditors if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent to distinguish from intent presumed in law to hinder, delay or defraud either existing or future creditors.

Section 70 E, 11 U.S.C.A. 110 (e) (1) of the Bankruptcy Act.

A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this act which under any Federal or State Law applicable thereto is fraudulent as against or voidable for any other reason by any creditor of the debtor having a claim provable under this act, shall be null and void as against the trustee of such debtor.

L.S.A.- R.S. 12, Sec. 27.

If any dividend shall be paid in violation of R.S. Title 12:26, or if any other unlawful distribution, payment or return of assets be paid to the shareholder: (a) The directors who knowingly or without exercising that diligence, care and skill, which ordinary prudent men in a like position would exercise under similar circumstances, voted in favor thereof, shall be liable jointly and severally to the corporation or to the creditors of the corporation or to both in an amount equal to an amount of the dividend so made and the distribution, payment or return of assets so made. This action must be brought within two years from the date of which such dividend, distribution, payment or return of assets was made.

La. Rev. Stat. Title 12 Section 36.

Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and shall discharge the duties of their respective positions in good faith and with their diligence, care, judgment and skill which ordinary prudent men would exercise under similar circumstances in like position.